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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1975

NO. A-751

ELMER HARRIS,

Petitioner,

v.

L. J. ULANICH, Storage Officer Material Department, Naval Supply Center; LAURENCE SPEARS, Director, Material Department, Naval Supply Center; V. A. LASCARA, Commanding Officer, Naval Supply Center; JOHN WARNER, Secretary of the Navy; The UNITED STATES OF AMERICA; JOHN WARNER, Secretary of the Navy, Department of the Navy, V. A. LASCARA, Commanding Officer, Naval Supply Center,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Your petitioner, Elmer Harris, hereby petitions for a writ of certiorari to review the decision of the Court of Appeals for the Fourth Circuit rendered in this case on December 3, 1975.

OPINION BELOW

The opinion of the District Court dated November 14, 1974, reported at ... F. Supp ..., 10 EPD ¶ 10,262, is set forth in the Appendix to this Petition.

The opinion of the Court of Appeals for the Fourth Circuit dated December 3, 1975 reported at ... F.2d ..., 10 EPD ¶ 10,551 is set forth in the Appendix to this petition.

JURISDICTION

The judgement of the Court of Appeals was entered on December 3, 1975. An extension of time for filing this petition up to and including April 1, 1976, was granted by an Order entered in this Court on March 4, 1976. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1). The jurisdiction of the District Court was predicated on Title VII of the Civil Rights Act, 42 U.S.C. § 2000e et seq., as amended by the Equal Employment Opportunity Act of 1972, 42 U.S.C. § 2000e-16(c); 28 U.S.C. §§ 1343 and 1346(a)(2); the Declaratory Judgment Act, 28 U.S.C. §§ 2201 and 2202; Rule 57 of the Federal Rule of Civil Procedure; 5 U.S.C. § 703; and 42 U.S.C. §§ 1981 and 1985.

QUESTION PRESENTED

(1) Whether the opinion of the District Court holding that there was insufficient evidence to support plaintiff's first complaint of racial discrimination, i.e. that plaintiff's immediate supervisor, L. J. Ulanich, did not permit plaintiff

to perform the full scope of his duties as a General Foreman WS-10, because of racial discrimination, was clearly erroneous.

(2) Whether the decision of the District Court that there was insufficient evidence to support plaintiff's second complaint of racial discrimination by reprisal for plaintiff having filed the January 3, 1973, racial discrimination complaint against L. J. Ulanich, i.e. when Ulanich issued to plaintiff a "Letter of Warning" dated April 17, 1973, alleging continued inadequate performance and threatening administrative action against plaintiff, was clearly erroneous.

(3) Whether the decision of the District Court that there was insufficient evidence to support plaintiff's third complaint of discrimination by reprisal for plaintiff having filed the January 3, 1973, racial discrimination complaint against L. J. Ulanich, when Captain Laurence Spears issued to plaintiff an "Advance Notice of Demotion" from General Foreman, WS-10 to Warehouseman Foreman, WS-6 by letter dated August 20, 1973, and the subsequent demotion of plaintiff effective September 21, 1973, was clearly erroneous.

(4) Whether the ruling of the Court of Appeals that the District Judge's findings were not clearly erroneous and affirming the decision of the District Court, was in error as a matter of law by failing to consider the overwhelming evidence that the real reason for the actions taken against plaintiff was

based upon racial discrimination for the plaintiff's efforts for over twenty-five years in combating racial discrimination at the Naval Supply Center, Norfolk, Virginia.

STATUTES INVOLVED

The statutes involved are Title VII of the Civil Rights Act of 1964 (42 U.S.C. § 2000e et seq.) as amended by the Equal Employment Opportunity Act of 1972 (42 U.S.C. Section 2000e-16), 5 U.S.C. §§ 4305, 4307 and 4308. The relevant sections that are directly involved include:

1. 42 U.S.C. 2000e-2

(a) It shall be an unlawful employment practice for an employer—

(1) to fail or to refuse to hire or to discharge any individual, or otherwise to discriminate any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex or national origin.

2. 42 U.S.C. 2000e-3

(a) It shall be an unlawful employment

practice for an employer to discriminate against any of his employees ... because he has opposed any practice made unlawful employment practice by this subchapter all because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

3. 42 U.S.C. 2000e-16

(a) All personnel actions affecting employees or applicants for employment... in military departments... in executive agencies... shall be made free from any discrimination based on race, color, religion, sex, or national origin.

(b) Except as otherwise provided in this subsection, the Civil Service Commission shall have authority to enforce the provisions of §(a) of this section through appropriate remedies, including reinstatement or hiring of employee with or without back pay, as will effectuate the policies of this section, and shall issue such rules, regulations, orders and instructions as it deems necessary and appropriate to carry out its responsibilities under this section...

The head of each such department, agency, or unit shall comply with such rules, regulations, orders and instructions...

(c) The provisions of sections 2000e-5 (f) through (k) of this title, as applicable, shall govern civil actions brought hereunder.

(d) Nothing contained in this Act shall relieve any Government agency or official of its or his primary responsibility to assure non-discrimination in employment as required by the Constitution and statutes or of its or his responsibilities under Executive Order 11478, relating to equal employment opportunity in the Federal Government.

4. 5 U.S.C. 4305

(a) An agency, on request of an employee of that agency, shall provide one impartial review of the performance rating of the employee.

(b) In addition to the review under §(a) of this section and employee with a current performance rating of less than satisfactory, on written appeal to the chairman of the appropriate board of review established under §(b) of this section, is entitled to a hearing and decision on the merits of the appealed rating. ...

(c) At the hearing the appellant, or his designated representative, and representatives of the agency are entitled to submit pertinent information, orally or in writing, and to hear or examine, and reply to, information submitted by others. After the hearing, the board of review shall confirm the appealed rating or make such change as it considers proper.

5. 5 U.S.C. 4307

An employee may not be given a per-

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formance rating, regardless of the names given to the rating, and a rating may not be used as a basis for any action, except under a performance-rating plan approved by the Civil Service Commission as meeting the requirements of this chapter.

6. 5 U.S.C. 4308

The Civil Service Commission may prescribe regulations necessary for the administration of this chapter.

STATEMENT OF THE CASE

Civil Action No. 73-369-N was filed on September 18, 1973, by plaintiff, a black male civilian employee of the U.S. Navy at the Naval Supply Center (NSC), Norfolk, Virginia, alleging racial discrimination in that he had been denied the opportunity to perform the full scope of his duties as a General Foreman I, while these duties were being performed by the white General Foreman I. Defendants were L. J. Ulanich, Storage Officer, Material Department, NSC; Captain Laurence Spears, Director, Material Department, NSC; Rear Admiral V. A. Lascara, Commanding Officer, NSC, and John Warner, then Secretary of the Navy. Defendants' answer was filed December 20, 1973.

Civil Action No. 73-486-N was filed on December 19, 1973, by plaintiff alleging that the "Letter of Warning" dated 17 April 1973 (for alleged unsatisfactory performance) and a follow-up letter dated 7 June 1973 (alleging continued inadequate performance and threatening

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administrative action) from L. J. Ulanich to plaintiff were acts of reprisal for the discrimination complaint filed January 3, 1973, by plaintiff. Defendants were John Warner, then Secretary of the Navy and Rear Admiral V. A. Lascara, CO, NSC, Norfolk, Virginia.

On April 3, 1974, plaintiff's first amended complaint was filed in C.A. No. 73-486-N, which added as a second cause of action, plaintiff's third EEO complaint which alleged that the letter dated 20 August 1973 from Captain Laurence Spears, giving advance notice of plaintiff's proposed demotion from General Forman WS-10 to Warehouseman Foreman WS-6 and the Navy's demotion of plaintiff effective 21 September 1973 was in reprisal for plaintiff's previously filed discrimination complaint. Defendant's answer to plaintiff's first amended complaint was filed April 17, 1974.

Following the initial pre-trial conference on 16 January 1974, for C.A. No. 73-369-N, the court on its own motion consolidated for hearings and trial that case with C.A. No. 73-486-N, which trial was set for June 6, 1974. Plaintiff filed interrogatories on April 3 and 16, 1974. Defendants filed a Motion for a protective order under Rule 26(c), but no hearing was requested. On May 16, 1974, the court denied plaintiff's motion for a continuance and withheld decision on plaintiff's motion to require defendants' to answer plaintiff's interrogatories.

On May 17, 1974, the court advised

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counsel, it had reviewed this matter and that plaintiff was entitled to a trial de novo, that counsel need not file the brief requested on May 16, that defendant's answer plaintiff's interrogatories by May 27, reset the final-trial confernece for May 24, and denied plaintiff's motion to continue the trial date. On June 5, counsel was notified by the court that this case could not be tried on June 6. It was reset and tried on August 19, 20, and 22, 1974. Seventeen witnesses testified and more than eighty-six exhibits were introduced. Plaintiff submitted a post-trial brief to the court. In its opinion of November 14, 1974, the district court found (1) that the plaintiff was entitled to a trial de novo, (2) that in reviewing the administrative record and hearing the evidence de novo, and taking them singularly or combined, there was insufficient evidence to support plaintiff's three complaints of discrimination because of his race. Judgment was entered in favor of this defendants.

On January 10, 1975, plaintiff filed his Notice of Appeal from the November 14, 1974 Decree. After briefing and argument, the court of appeals for the fourth circuit affirmed the decision of the district court in its opinion dated December 3, 1975.

Plaintiff, a black citizen, has been a civilian employee at NSC, Norfolk, Virginia, for over thirty (30) years. It is undisputed that for over twenty (20) years plaintiff has received sustained superior performance or outstanding performance ratings in all of

the positions he has held at NSC, until November 1970. At that time plaintiff and William H. Foutz, white, were both promoted to the position of General Foreman, WS-10, in Storage Branch No. II, Material Department, NSC, under the direct supervision of defendant L. J. Ulanich, Storage Officer, GS-12. Plaintiff has received cash awards for his outstanding performance and for the submission of beneficial suggestions which resulted in monetary savings and more efficient operations at NSC. Plaintiff has taken courses in middle management, management-labor relations and supervisory development to aide him in the performance of his duties.

It is undisputed that plaintiff was fully qualified for the position of General Foreman to which he was promoted in November 1970. Further, plaintiff applied for the position of Storage Officer, GS-12, and was found to be fully qualified, receiving a rating of 91.60 and his standing on the register was number 5 by notice dated 4 January 1973. In connection with that application, plaintiff received a supervisor's appraisal from Ulanich of 88, dated 21 December 1972. It should be noted that in his letter of April 17, 1973, Ulanich claimed that plaintiff's performance was deteriorating for the previous six months, whereas the supervisor's appraisal given by Ulanich on December 21, 1972, stated that plaintiff's performance was very good. As the result of the demotion which he received on September 21, 1973, plaintiff was not eligible to apply for the position of Supply Management Officer GS-12, dated 10 May 1974.

When plaintiff began his duties as General Foreman I in November, 1970, he supervised about 80 employees and Foutz supervised about 110 employees initially. Plaintiff felt he was subject to racial discrimination by Ulanich in the performance of his duties, requested a conference with Ulanich on October 16, 1972, but was unsuccessful in resolving his complaint. By letter dated October 30, 1972, plaintiff requested a conference with Captain Laurence Spears, Director, Material Division NSC, concerning his claim of racial discrimination against Ulanich. On November 9, 1972, plaintiff was directed to the office of Thomas Renn, Director, Civilian Personnel Department (CPD). Plaintiff explained his problems with Ulanich to Renn and Captain Spears, and Renn gave plaintiff the impression that he was going to correct the situation. Captain Spears said nothing and left before the conference was over.

Plaintiff was directed to report to Captain Spears' office on November 20, 1972, where Spears berated plaintiff for writing the letter of October 30, stated that Ulanich was plaintiff's supervisor and if there was anyone to take action against, it would be against plaintiff, that Spears was tired of all this "nit-picking", and that plaintiff had his EO, whatever it was, if he wanted to use it. Renn said "it's the EEO". The conference was terminated with no relief granted by Captain Spears on plaintiff's complaint of discrimination by Ulanich. On November 22, 1972, plaintiff discussed his problem with EEO Counselor, and requested a hearing by the EEO Committee

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of NSC. On December 7, 1972, the EEO Committee heard plaintiff's complaint, talked to Ulanich and investigated it further concluding that Ulanich appeared to be discriminating against the plaintiff because of his race. The Committee was unable to correct the problem and referred the same to the Commanding Officer of NSC for correction. The CO took no action to correct Ulanich's conduct towards plaintiff. Plaintiff filed his first EEO Complaint on January 3, 1973, alleging denial of the opportunity to perform his duties, interference and harassment by Ulanich. The EEO Investigators report show that other than the plaintiff, the only persons that he interviewed were white, three of whom would be the persons who were directly or indirectly responsible for the discrimination about which plaintiff was complaining. Plaintiff requested a hearing on his first EEO complaint which was held on May 23 and 24, 1973. On August 21, 1973, the decision of the Secretary of the Navy finding no discrimination was transmitted to plaintiff. C.A. No. 73-369-N based upon plaintiff's first EEO complaint was timely filed on September 18, 1973.

While the first EEO complaint was being administratively processed, the plaintiff was issued a "Letter of Warning" dated 17 April 1973, from Ulanich alleging unsatisfactory performance of his duties as General Foreman. Plaintiff immediately protested said letter and following an exchange of correspondence with the CO, plaintiff consulted an "EEO counselor". On June 20, 1973 (amended June 22, 1973) plaintiff's second formal EEO complaint was filed based upon the "Letter of

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Warning", dated 17 April 1973 and a follow-up letter from Ulanich dated 7 June 1973 (which alleged continued inadequate performance of duties by the plaintiff and threatened to take administrative action) alleging that said letters were a reprisal for the first EEO complaint previously filed by plaintiff.

The EEO investigator of the second complaint interviewed four white employees and one black employee, whose affidavit supported plaintiff's contention of harassment in the performance of his duties. The EEO investigator recommended a finding of no discrimination. Plaintiff stated his dissatisfaction with the proposed disposition of his reprisal complaint and requested a decision by the Secretary of the Navy without a hearing. By letter dated 20 November 1973, plaintiff was advised of the final decision by the Navy finding no discrimination by reprisal. Plaintiff's complaint challenging the final decision of the Navy was timely filed on December 19, 1973, in C.A. No. 73-486-N.

Plaintiff's annual performance rating period would have ended 31 May 1973. In Ulanich's "Letter of Warning", dated 17 April 1973, he gave plaintiff 90 days to improve his performance and threatened to give him an annual performance rating of "unsatifactory". Ulanich extended the rating period to allow a full 90-day warning period, which was again extended by Ulanich in his letter of 7 June 1973. On 13 June 1973, Ulanich forwarded a memorandum to Captain Spears recommending plaintiff's demotion for an alleged failure to perform satisfactorily his dutied as

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General Foreman. Captain Spears assigned the matter to Mrs. Alma D. Bradshaw on June 29, 1973, for an alleged pre-action investigation by report dated 30 July 1973, Mrs. Bradshaw concurred with the Ulanich recommendation that Harris be demoted. By letter dated August 20, 1973, Captain Spears gave plaintiff "Advance Notice of Demotion" from General Foreman WS-10 to Warehouseman Foreman WS-6. Plaintiff through counsel, responded by letter dated August 30, 1973, denying the allegations in the August 20 letter of Captain Spears. On September 21, 1973, plaintiff, Elmer Harris, was demoted. After consulting with EEO counselor Sharp, plaintiff filed his third EEO complaint on October 15, 1973, stating that his demotion was a reprisal for his previously filed racial discrimination complaint. It is undisputed that plaintiff never received his annual performance rating for the period ending 31 May 1973.

Plaintiff's third EEO compalint was assigned to Moses T. Boykins (black). Significant facts were developed which tended to support plaintiff's complaint of racial discrimination by reprisal. Although Boykins completed the investigation, the report of Investigation recommending a finding of no discrimination was written by another investigator, Burton E. Owens (white). By letter dated March 12, 1974, plaintiff stated his dissatisfaction with the proposed decision and requested a final decision by the Department of the Navy. By letter dated 19 March 1974, the Department of the Navy stated there was no reprisal nor discrimination involved in plaintiff's demotion on 21 September 1973.

On April 3, 1973, plaintiff timely filed his First Amended complaint in C.A. No. 73-486-N, and in the second cause of action plaintiff challenged the final decision of the Department of the Navy on his third EEO complaint.

The undisputed evidence which was totally ignored by the district court shows that there has been a long history of racial discrimination in the employment policies at NSC. In 1952, the Fair Employment Board of the U.S. Civil Service Commission recommended that the Navy Department take necessary steps to insure that candidates for promotion to supervisory positions were given proper consideration on the basis of merit and fitness. Further, that the Navy Department notify in writing all officers and employees of the Ship's Supply Depot (now NSC) of the Navy Department's Fair Employment Policies and that the Navy make continuing appraisal of appointments and promotions to supervisory positions for a period of six months. The Board acted on a complaint of racial discrimination filed by the plaintiff in April 1952, for refusing to promote black employees to any position which required supervision over white employees.

In 1959, black employees formed the Tidewater Federal Employees Association (TFEA) in an effort to correct the continuing problems of racial discrimination in employment practices at NSC. A committee, including plaintiff, Elmer Harris, and his brother, Emerson Harris, from TFEA met with Rear Admiral Haynsworth, then CO of the NSC, on several occasions, but their effort to eliminate the dis-

criminatory practices were unsuccessful. On 30 November 1959, plaintiff and his brother, Emerson Harris, were ordered to report to the CO's office where Admiral Haynsworth admonished and berated them before other Naval Officers who were present in reprisal for their actions in exposing racial discrimination at NSC. On 19 January 1960, Admiral Haynsworth wrote a letter to plaintiff and his brother attacking their conduct and the letter was filed in their official personnel folders.

In February, 1960, the TFEA filed a discrimination complaint with the President's Committee on Government Employment Policy, alleging racial discrimination at NSC in the following areas: (1) In job assignments involving training opportunities and experience necessary for promotion; (2) In promotion practices by raters, selection panel members and officers; (3) In maintaining segregation of work units; (4) In assignments to jobs which qualify employees for supervisory positions, particularly where a black would supervise white employees; (5) Operating the promotion program and procedures to frustrate black promotion, particularly at the GS-5 level and above; (6) The pattern of discrimination was controled and maintained by William Vassil, Industrial Relations Officer (now CPD) with no corrective action by the CO; (7) The verbal admonishment by Admiral Haynsworth on 30 November 1959, of Elmer Harris and Emerson Harris, two officers of TFEA. The letter of 19 January 1960 from Admiral Haynsworth attacking the conduct of Elmer and Emerson Harris in reprisal for their actions in

exposing racial discrimination at NSC, which letters were filed in their official personnel folder.

During the five years of administrative processing of this complaint, the letter of 19 January 1960 from Admiral Haynsworth was removed from the personnel folders of Elmer and Emerson Harris on 23 July 1963. The Summary Disposition Report of the TFEA racial discrimination complaint was issued on 24 February 1965. After reluctantly acknowledging two instances of probable discrimination, the Navy stated it was then too late to correct any particular actions that may have involved racial discrimination, and recognized "that the Supply Center may not have been completely free of discriminatory practices and habits. The Center is located in an area in which segregation and discriminatory practices have been long engrained, and the Center itself at one time followed the segregation practices of the community. The Center has been, and still is, in transition from the pro-segregation practices and belief to the non-discriminatory practices that are required now and in this transition has attempted to change policies, practices, and the attitudes of individuals so that discrimination will not occur. This does not, of course, serve to excuse any discriminatory practices that may have occurred."

The undisputed evidence showed that black employees have been limited to positions in the lowest graded and ungraded ratings. They have been denied supervisory positions, particularly where they would supervise white employees, and vertually excluded from positions from GS-9

and WF-10 and above. The NSC Affirmative Action Plan and Numerical Goals Reports for 1972, 1973, and 1974 clearly reflect that this problem persists and continues 15 years after the TFEA racial discrimination complaint was filed in 1960.

The Report of Inspector General dated 11 January 1974 on the Command Inspection of EEO Program, NSC, Norfolk, Virginia, while acknowledging some progress of blacks in the Command expressed grave concern in the following areas.

"...first and second level supervisory apathy toward EEO; employee fear of reprisal action (from supervisors and coworkers) for use of the EEO complaint procedure; unfavorable supervisory vouchers for promotion which are inconsistant with annual performance ratings; the "buddy system" in work assignments and promotion selections; need for periodic group meetings with the supervisor to find out "what is going on" in the organization."

This Report states that prior to July 1973, the EEO Program was handled by the Civilian Personnel Department and the EEO Coordinators assignment held successively by Renn, Director CPD, and a trainee GS-5 Employee Relations specialist. A full time Deputy EEO Officer, GS-12 was hired in July 1973, who is a high school graduate, and has one full time assistant, GS-7 and a secretary, GS-4. This Report contained several detailed suggestions for improvement of the EEO Program at NSC. Defendants offered no evidence to dispute this Report or to show that corrective action was being taken at NSC. It is clearly apparent that discrimination against black employees and women is still

a very serious problem at NSC.

The defendants admitted that the 1970 Census Report for the Standard Metropolitan Statistical Area of Norfolk and Portsmouth, Virginia showed that 22.4% of the potential work force was composed of blacks. The statistics for NSC as of 1 April 1972 show that there are 13 departments with 255 jobs available in grades GS-9 to 15, with 14 jobs (5.4%) held by blacks. In 6 departments with 29 jobs, none were held by blacks. In 3 departments with 73 jobs only 3 (4%) were held by blacks. In three other departments with a total of 120 jobs, each had 3 blacks (7.5%). Other than a few token blacks, the picture at NSC, particularly at grades GS-9 and WS-10 and above, is exactly the same as it was ten years ago, with black employees concentrated in the lower graded and ungraded rates and effectively excluded from the higher grades, particularly those with supervisory responsibility.

The Equal Opportunity statistics attached to defendant Lascara's response to plaintiff's second interrogatories show the percentage of black employees in grades GS-9 and above at NSC as follows: 1971-5%, 1972-7%, 1973-6%, and 1974-7%. Over this four year period the percentage of blacks in said grades has ranged between 5 to 7% and has remained relatively constant.

The opinion of the District Court totally ignored the undisputed evidence of the long history of racial discrimination in the employment policies at NSC. The District Court ignored the undisputed evidence that the plaintiff, Elmer Harris, filed a complaint of racial discrimination

as early as 1952, as a result of which discrimination was found and the plaintiff was promoted to a supervisory position. The District ignored the undisputed evidence concerning the discrimination complaint filed by the TFEA, and the conclusion that NSC had not been completely free of discriminatory practices and habits. The District Court ignored the undisputed statistical evidence revealed by the NSC Affirmative Action Plan and Numerical Goals Reports for 1972, 1973, and 1974, showing that the discrimination problem continues at NSC over twenty years since the plaintiff filed his first complaint of racial discrimination in 1952. The District Court ignored the undisputed evidence shown by the Report of Inspector General dated 11 January 1974, reflecting employee fear of reprisal action for use of the EEO complaint procedure and several other deficiencies evident in the EEO Program at NSC.

REASONS FOR GRANTING THE WRIT

The Government contended that Ulanich was just a hard and demanding supervisor and that his actions toward the plaintiff were not motivated by racial discrimination. In examining the problem of employment testing and its relationship to employment discrimination, this Court stated in Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971) has follows:

"Congress has now provided that tests or criteria for employment or promotion may not provide equality of opportunity merely in the sense of the fabled offer of milk to the stork and the fox. On the contrary, Congress has now required that the posture

and condition of the job-seeker be taken into account.... The act proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation. The touchstone is business necessity. If an employment practice which operates to exclude Negroes cannot be shown to be related to job performance, the practice is prohibited."

Continuing, this Court in Griggs ruled that "good intent or absence of discriminatory intent does not redeem employement procedures or testing mechanisms that operate as "built-in headwinds" for minority groups and are unrelated to measuring job capability." The evidence clearly shows that Ulanich denied plaintiff the opportunity to perform the duties and responsibilities of his position as General Foreman. The actions of Ulanich took several forms, as follows:

1. Ulanich had plaintiff's office moved out of the branch office on the third floor to the fifth floor, while the office of Foutz was moved to a position adjoining the branch office. When first proposed by Ulanich, plaintiff discussed his objections to the move with Commander Swartz, who cancelled the proposed move. His replacement, Commander Sofley, approved the move of plaintiff's office. Plaintiff's objections that it would remove him from the center of the branch operations and access to instruction books, that he would have no clerk to answer the telephone or receive messages in his absence or perform typing duties, that he would be denied access to equipment in the branch office, and that in the absence of Ulanich, he would not have the opportunity to serve as acting branch head in Ulanich's absence and

thereby gain experience in that position, which he had done alternatively with Foutz prior to the movement of plaintiff's office to the fifth floor. Further, Ulanich directed the clerk to bring all typing requested by plaintiff to Ulanich for approval. Thus, plaintiff would have no way to document a memorandum requesting additional personnel or making of report, and it became a question of plaintiff's word against that of Ulanich when the issue was raised as to whether or not plaintiff did certain things. Meanwhile, Foutz whose office immediately adjoined the branch office, had convenient access to all of the assistance, facilities and services provided by the branch office. Finally, there were no blacks employed in the branch office after plaintiff's office was moved to the fifth floor, until after plaintiff filed his first discrimination complaint.

2. In assigning new employees, Ulanich took them directly to the subordinates of plaintiff, but introduced new employees to Foutz, who would introduce these new employees to his subordinates, which Foutz admitted.

3. On numerous occasions, Ulanich assigned temporary employees to units under plaintiff's supervision, without plaintiff's knowledge when plaintiff had not requested any temporary assistance or stated he did not need any. This was stipulated to by Government Counsel at pages 247-248 of the trial transcript.

4. Ulanich made temporary assignment of personnel under plaintiff's supervision to other areas without plaintiff's knowledge. Ulanich admitted this practice from the day plaintiff reported for duty until plaintiff

was demoted.

Ulanich was also plaintiff's supervisor when plaintiff filed a previous complaint of racial discrimination in 1952. The Navy's decision that there was no discrimination against plaintiff was reversed on appeal by the Fair Employment Board in August 1953.

At page 14 of its opinion, the district court recognized that the EEO Complaints Examiner found that Ulanich treated plaintiff differently than Foutz (white), but rejected racial discrimination as the cause. The district court's rejection of racial discrimination as the cause is clearly against the weight or preponderance of the evidence, or is clearly erroneous Kansas City Stockyard Co. v. Anderson, 199 F2d 91. As stated in Griggs, supra, page 433, administrative interpretation of the Civil Rights Act by the enforcing agency is entitled to great deference. It was held in EEO decision, case no. YSF-9-108 (June 26, 1969) CCH EPD ¶_____, to 2 FEP Cases _____, that Title VII of the 1964 Act prohibits employers from discriminating against workers in their terms, conditions or privileges of employment on the basis of race, color, etc., 42 U.S.C. 2000e - 2(a).

When plaintiff tried to resolve his problems with Ulanich through channels, Captain Spears told him that he was tired of the plaintiff raising alleged problems of racial discrimination and that the Captain was not going to answer plaintiff's letter of October 30, 1973, requesting a conference and some releif, and if the plaintiff did not like he could file an

EEO complaint.

Captain Spears, a defense witness, testified he first heard of the plaintiff the first day he walked into the Director's office where plaintiff was in conference with Commander Swartz. Defendant stipulated that plaintiff met with Captain Spears on November 9 and 20, 1973 and Captain Spears did not testify that those meeting occurred in any different fashion than as stated by the plaintiff. An employer discriminates against an employee by failing to take any action to maintain an environment free of racial intimidation when he clearly has knowledge of racial harassment of that employee.

As Storage Officer, Ulanich was responsible for the operation of Storage Branch No. 2 and that his responsibility was exercised through his two General Foreman, the plaintiff and Foutz. The General Foreman were responsible for the planning, coordinating and directing the activities of their subordinates in their respective areas of supervision. The district court either ignored or was unable to perceive the preponderance of the evidence which clearly showed that the plaintiff was denied the opportunity to perform his duties as General Foreman I, that plaintiff was subjected to extensive harassment, interference with his work, assignment of temporary personnel with out his knowledge or request, assignment of personnel when plaintiff indicated they were not needed, giving direct orders to plaintiff's leadingmen, warehousemen or stockmen, denying plaintiff the opportunity to properly utilize temporary personnel working in areas under his supervision and accusing

plaintiff of disobeying his orders, all done by Mr. Ulanich. There was little evidence to show the same pattern by Ulanich toward the white General Foreman, Foutz. There is a preponderence of the evidence which shows that the actions of Ulanich toward the plaintiff were based on racial discrimination and the Government has not shown that the actions of Ulanich have a legitimate, non-discriminatory basis, which are "related to job performance", and hence his actions are prohibited discrimination against the plaintiff.

The district court acknowledged the ruling of this Court in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 800-04 (1973), and held that the facts in this case are far different from those in McDonnell and thus the precise factors there applied are not applicable. The district court at page 21, held: "Harris has shown that he is a member of a minority race, and that he was treated somewhat differently from the white general foreman. What Harris has failed to show is that the difference in treatment is related to the fact that he is black. Even if we assume that Harris' first complaint states a prima facie case, defendants have explained their actions and the explanation has not been shown to be a mere pretext." Dispite the abundant evidence to the contrary, the district court erroneously concludes that the explanation given by defendants for their actions is, in fact, a mere pretext for their racially discriminatory action against this plaintiff.

Many courts have observed that proof of overt racial discrimination in employment is seldom direct. Recognizing this

problem, the court in Brown v. Gaston County Dyening Machine Co., 457 F2d 1377 (4th Cir. 1972) stated that they have found "error in limiting Title VII to present specific acts of racial discrimination, U.S. v. Dillon Supply Co., 429 F2d 800, 804 (4th Cir. 1970)." The Fourth Circuit pointed out in Brown that it is now well established that Courts must also examine statistics, patterns, practices and general policies to ascertain whether racial discrimination exists. U.S. v. Jacksonville Terminal Co., 451 F2d, 418, 442 (5th Cir. 1971); Graniteville Co. v. EEOC, 438 F2d 32, 41 (4th Cir. 1971); Jones v. Lee Way Motor Freight, Inc., 431 F2d 245, 247 (10th Cir. 1970), cert denied 401 U.S. 954; U.S. v. Dillon Supply Co., supra.

The ruling of the district court holding that the actions of Ulanich in sending plaintiff the "Letter of Warning" of 17 April 1973, and the follow-up letter of 7 June 1973, and the demotion of plaintiff effective 21 September 1973, were not in reprisal for plaintiff's having filed a racial discrimination complaint were clearly erroneous and disregarded or misconstrued the evidence.

In his "Letter of Warning" dated 17 April 1973, Ulanich listed several undated charges against the plaintiff. The undisputed evidence shows that Ulanich had not taken any disciplinary action against plaintiff at the time any of these alleged charges occurred, such as a verbal admonishment, a "Letter of Caution", or suspension from his job without pay. The undisputed evidence shows that when Ulanich previously attempted the use of a "Letter of Caution"

on 25 July 1972, impartial investigation found there was no basis for said "Letter of Caution", and it was rescinded by Commander Swartz.

The "Advance Notice of Demotion" contained in the letter to plaintiff from Captain Spears dated 20 August 1973, is based on many of the same charges set forth in the "Letter of Warning" of 17 April 1973, included charges prior to that date, but which were not included in the "Letter of Warning", and repeated many charges in different parts of said letter.

Ulanich got the assistance of Mrs. Marian Harris, Labor-Management Relations Specialist in CPD, and she prepared the "Letter of Warning" dated 17 April 1973, the "Advanced Notice of Demotion" dated 20 August 1973, the memo from Captain Spears dated 29 June 1973, directing Mrs. Alma D. Bradshaw to investigate the demotion action recommended by Ulanich to Captain Spears, and the memo from Captain Spears dated 17 September 1973, to plaintiff demoting him effective 21 September 1973. This same Marian Harris was management's representative at the EEO hearing on plaintiff's first complaint on May 23-24, 1973. Over plaintiff's objections, the same Marian Harris was permitted by the Court to be the Government's representative and sat at counsel table during the trial of this case although she had been subpoenaed by the plaintiff.

In the "Letter of Warning" dated 17 April 1973, several charges involving events at which Ulanich was not present and had no direct first hand knowledge were listed against the plaintiff.

Paragraph 1-a refers to an alleged shouting match in CPD involving Mr. King and Mr. Holmes, two employees under plaintiff's supervision. The allegation was specifically denied by Holmes, King, and by plaintiff, who were all present, and even Commander Sofley, a defense witness, admitted that no shouting took place. Next, some general statements alleging that plaintiff accused Ulanich of browbeating his employees and threatening to strike plaintiff, with no date, place or circumstances specified.

In paragraph 1-b Ulanich accuses plaintiff of moving temporary personnel assigned to specific areas without advising Ulanich and suggesting that there were back logs of work in plaintiff's area. One of plaintiff's specific duties as set forth in his job description was to determine his manpower needs and shift his personnel when necessary to meet various work loads within his area of supervision. This is an excellent example of the kind of harassment which plaintiff was being subjected to by Ulanich.

In paragraph 1-c Ulanich accuses plaintiff of failing to cooperate with others and cites the challenge incident in January, 1973, involving J. R. Carter, a white employee of the branch who was escorting about twenty people who did not have did not have visitors badges. The challenge procedure is set forth in exhibit 79, NSCNORVA Instruction 5450-1E Section 2-107. The purpose is to ensure that any person not assigned to a particular area is challenged before being permitted to enter the area and covers all persons including an NSC employee not assigned to the specific area, as well as military personnel and visitors. Several witnesses testified

regarding the challenge procedure and the requirement to follow same at NSC for security reasons and to minimize theft of Government property. If the plaintiff had failed to challenge Carter on this occasion, it is clear that Ulanich would have charged plaintiff with failing to follow the challenge procedure as required by the instruction.

Next the "Letter of Warning" refers to the request to plaintiff to investigate the CBW Shift Report prepared by George Madrid for 1 April 1973. That report indicated that Madrid's crew working on a Sunday, had worked all Group I, some Group II's, but not all, and then worked some Group III documents in issuing material. Madrid told plaintiff that Ulanich had told him that when too much time in research was lost in working Group II documents, he should go on and work the Group III, otherwise it would appear that the production of his crew would be below the standards for the period worked. Madrid's report did not contain any explanation as to why he had not completed working the Group II, but previous reports which reflected the same situation had been turned in without any explanation attached and had not been questioned. On 3 April 1973 Madrid gave Commander Sofley the same explanation which he had previously given to plaintiff, and repeated that explanation on 6 April 1973 to Sofley with Ulanich present, and Ulanich did not deny giving those instructions to Madrid. Plaintiff's only participation was to investigate and make a report, which he did. However, this matter was included in the "Letter of Warning" and as item 1-c(3) on page 7 of the "Advance Notice of Demotion" dated 20 August 1973 as an example that plaintiff

was failing to maintain cooperative relationships with his subordinates and superiors.

Ulanich also accused plaintiff of arriving late for meetings and attempting to distract others by clicking his pen repeatedly or shuffling papers. No dates or times were given and these allegations were specifically denied by plaintiff and several other witnesses who were present at branch meetings.

Ulanich testified that he thought these alleged charges against the plaintiff were important. Yet he did not take any diciplinary action at the time any of these alleged charges occurred, such as "A Letter of Caution" or suspension from his job without pay. Ulanich knew that a "Letter of Caution" or other diciplinary penalties, other than a verbal admonishment, could be appealed by the plaintiff, and none were given by Ulanich for any of these alleged charges.

In the "Advance Notice of Demotion" dated 20 August 1973, from Captain Spears, many of the same charges set forth in the "Letter of Warning" of 17 April 1973, and others which allegedly occurred prior to 17 April 1973, but which were not included in the "Letter of Warning" were set forth in this twelve page, single spaced letter. At the trial plaintiff specifically discussed and denied each and every charge made in said letter of 20 August 1973 and produced witnesses and documentary evidence to fully support his position.

The basis for several of the charges was alleged back logs in work in areas under plaintiff 's supervision. Item 1-a(1) and

(2) and (3) are typical of charges which had no foundation in fact. Joseph Holmes, who supervised an area under plaintiff's supervision, testified that there were no back logs of receipts in his area on 28 February 1973 and that he sent two men back which Ulanich had sent to his areas since he did not need them at that time. On 1 March 1973, when Holmes did need a couple of temporary men, they were secured from the first floor area under plaintiff's supervision when the supervisor in that area indicated he could spare two men after they conferred with plaintiff. Item (2), on 30 March, 1973, also involved Holmes, and was cited again as item 1-b(4) on page 7 of the letter of 20 August 1973 as a separate charge. Holmes and plaintiff both denied the charge. Item (3) on 17 April 1973, also involved alleged back logs in Holmes' area, and he testified that there was no back logs in his area, that receipts to be stored were continually coming in and being stored by his men. Holmes was also involved in item 1-c(5) on 3 May 1973 when plaintiff requested Holmes to assist a Navy Lieutenant who had been referred to plaintiff by Ulanich, and Holmes took care of the problem for the Lieutenant as requested by plaintiff. Holmes was also involved in item 1-c(6) on 16 May 1973 when Ulanich objected to Holmes accompanying plaintiff and Ulanich on a tour of Holmes's area. This was the usual procedure that had been followed in this situation and no reason was given by Ulanich as to why this procedure should not have been followed at that time.

Many of the charges in the letter of 20 August 1973 were based upon alleged back logs in areas under the supervision of the plaintiff, and particularly under the

direct supervision of Joseph Holmes. Holmes appealed his annual performance rating for the period ending 31 May 1973 when he received a rating of Satisfactory, with a rating of O (Outstanding) in two rating factors and S (Satisfactory) for the factor of Quantity. At the hearing before the Performance Rating Board of Review, Ulanich testified as to alleged back logs in Holmes' area, and plaintiff testified as to the absence of any alleged back logs. The Board concluded that "production in the appellant's area was 10% to 15% above the standard. It was established to the Board's satisfaction that although the area under the appellant's jurisdiction handled mostly fast moving items, he never had a "true" inventory back log." The Board concluded that Holmes annual performance rating should be Outstanding as shown by exhibit 44. Other foremen under plaintiff's supervision also received Outstanding annual performance ratings for the period ending 31 May 1973.

The testimony of James H. Garrett, Jr., (white), on Quality Control Analysis of delayed receipt listing of 1 April 1973 showed that areas under plaintiff's supervision were not responsible for delayed receipts listing and that his unit exceeded their required quality rate as shown by exhibit 61. Exhibits 62 and 63 dealing with medical items, and 64 dealing with issue picking, and 66 showing the average daily work load for the various units in Storage Branch 2, supported plaintiff's position. The weekly MUACS labor and production report for Storage Branch No. 2 shows the production for each unit per week and if plaintiff's units had any back logs and were not producing, this

would have shown that information as well as the production in Foutz's area of supervision. The defendants did not produce said weekly report although requested by the plaintiff, and the defendants produced no statistics or records to support any claims of alleged back logs in plaintiff's area of supervision.

The testimony of the plaintiff and numerous witnesses and supporting exhibits which showed by a preponderance of the evidence that the charges in the letter of 20 August 1973 were not supported and did not demonstrate any basis upon which plaintiff should have been demoted on 21 September 1973, and the failure of the defendants to produce any statistics or records to support their claims of alleged back logs in plaintiff's area of supervision were either misunderstood or misinterpreted by the district court. The Government's explanation that these actions and charges against the plaintiff were not in reprisal for his previously filed discrimination complaint was accepted by the district court in complete disregard to plaintiff's evidence, exhibits and the historical background of racial discrimination at NSC.

In Hyland v. Kenner Products Co., (D.C. Ohio Nov. 1974) 9EPD ¶ 10,108, the court held that the discharge of an employee during the pendency of the administrative period provided for by the Act for investigation and conciliation was an obvious interference with the proceedings. The court did not question the employers' right to discharge in the interim for clear cause. However, interim discharge makes a prima facie case of reprisal and

the employer must be prepared to meet and overcome same, or risk the result of the administrative interference. There, the court granted a temporary injunction against the employer's discharge of the employee who had a pending conplaint under investigation by the EEOC.

In Chemical Workers, Local 795 v. Planters Manufacturing Co., EEO Decision, cases nos. 5-12-3175-3179, (April 18, 1966) CCH EPG ¶ 1305.12, it is unlawful under Title VII for any employer to discriminate against employees because of such individual's opposition to practices made unlawful by the EEO provision of the Act. In that case a local union president was discharged after filing charges with EEOC and filing suit under Title VII. The employer's explanation that the discharge was for stealing company gasoline was held to be pretextual.

In EEO Decision No. 71-1115, January 11, 1971, CCH EPG ¶ 1350.205, it was held that in view of the facts that supervision of the department was lax in terms of requiring attention to duties and arrivals on time, it was reasonable to believe that in depth scrutiny of a Negro employee's performance, filing of corrective disciplinary notices in her personnel folder and encouraging harassment by other employees contituted unlawful discrimination on the basis of race or retaliation for her complaining of discrimination with respect to compensation and a promotion denial.

It was undisputed that Ulanich had never sent any other employee a "Letter of Warning" and had to obtain expert help from Mrs. Marian Harris at CPD. In his three years at NSC, Captain Spears knew

of no other supervisor who had been demoted, other than the plaintiff.

Employers who discharged employees in reprisal for union activities have engaged in unlawful discrimination. Tulsa-Whisenhunt Funeral Home, Inc. & Service Employees International Union, AFL-CIO, Local 245, 1972 CCH NLRB 23,841 (January 26, 1972) affirmed 71 LC ¶ 13883 (10th Cir. 1973). The NLRB found that the employer engaged in unlawful discrimination by discharging three employees for their union activities, dispite the employers contentions that one employee quit and that the other two were discharged for lying and dishonesty. See Self-Reliance Ukrainian American Cooperative Association, Inc., DBA Certified Food v. NLRB, 68 LC ¶ 12,639 (7th Cir. 1972). In NLRB v. LaPeka, Inc., 68 LC ¶ 12,726 (10th Cir. 1972) an employee was allegedly discharged because of an accident, but the true reason was because of his union activities. Many employees who had been involved in more costly and wreckless accidents had only received reprimands in the past.

Lack of discriminatory intent is no defense to liability under Title VII. Williams v. General Foods Corp., 492 F2d 399, 404 (7th Cir. 1974), where the court stated "the standard of liability under Title VII is simply "engaging in unlawful employment practices". Congress directed the thrust of the Act to the consequences of employment practices, not simply the motivation. The same interpretation has been applied in a discrimination case filed under 42 U.S.C. 1981. In Long v. Ford Motor Co., 352 F. Supp. 135 (E.D. Mich. 1972), the court held that the intent or motivation to discriminate

racially need not be shown to establish a violation of the Statute providing that all persons shall have the same right to make and enforce contracts as is enjoyed by white citizens. The court found that Long, although a capable man, was not given adequate job training as he was shifted from job to job and that fostered racial discrimination.

5 U.S.C. 4305 provides for review of the annual performance rating given to employees. § 4307 provides that an employee may not be given a performance rating and a rating may not be used as a basis for any action, except under a performance rating plan approved by the Civil Service Commission (CSC). Under § 4308 the CSC adopted regulations dealing with performance ratings in 5 CFR 430. § 430.401 provides for appeals by employees of an annual performance rating of unsatisfactory or satisfactory within thrity days after the employee receives notice of his rating.

Both the plaintiff and Ulanich testified that Elmer Harris never was given his annual performance rating for the period ending 31 May 1973. Instead, the rating period was extended for 90 days by the "Letter of Warning" dated 17 April 1973 pursuant to NSCNORVA Inst. 12430.2J. By a letter dated April 23, 1973, to the CO, NSC, plaintiff's attorney filed a complaint of reprisal based on the "Letter of Warning". The CO replied by letter dated 3 May 1973 stating that if plaintiff believed the reprisal action was being taken because he had filed an EEO complairt, then the provisions of § 713.213 (Federal Personnel

Manual) should be followed. Plaintiff's counsel by letter dated May 18, 1973 advised the CO that plaintiff would file another complaint of discrimination by reprisal under § 713.211 through .222.

Defendants proceeded to attack plaintiff's performance by the letter from Captain Spears dated 20 August 1973. In the letter dated 17 September 1973, Captain Spears advised that plaintiff would be demoted effective 21 September 1973, and referred to plaintiff's appeal rights as shown in NSCNORVA Inst. 12430.2J, which states that an employee may appeal to the NSC Performance Rating Board or to the Civil Service Commission Board of Review, within the time limits specified. In the instant case, plaintiff was never given any annual performance rating for the period ending 31 May 1973. Thus he was effectively denied his rights to appeal his annual performance rating as provided by 5 U.S.C. 4305. In footnote 15 at page 30, the district court holds that this contention is collateral to the issues of racial discrimination and thus is not properly before the court. Thus the district court ignores the fact that the defendants attack on plaintiff's performance and their subsequent demotion of plaintiff was in violation of the 5 U.S.C. 4305 and 4307, and the CSC regulations which control performance ratings, disciplinary actions and the handling of EEO complaints.

In Title VII discrimination cases, statistics often demonstrate more than the testimony of many witnesses, and they should be given proper effect by the court. Johnson v. Goodyear Tire & Rubber Co., 491 F2d 1364 (5th Cir. 1974); Brown v. Gaston County Dyeing Machine Co., 457 F2d 1377, 1382

(4th Cir. 1972); U.S. v. Dillon Supply Corp., 429 F2d 800 (4th Cir. 1970).

In Pettaway v. American Cast Iron Pipe Co., 494 F2d 211 (5th Cir. 1974), the district court held that the statistical demonstration of the derogation of black employees to lower paying jobs and departments was for reasons other than racial discrimination. The appellate court found that holding was "clearly eroneous" pointing out that analysis and the evidence disclosed that the reasons relied upon by the district court had no substantial validity. See also U.S. v. Jacksonville Terminal, 451 F2d 418 (5th Cir. 1971).

Following the principles laid down by this Court in McDonnell, plaintiff submits that he has carried the burden of showing a prima facie case, that the burden shifted to the defendants "to articulate some legitimate, non-discriminitory reason" for their actions in sending plaintiff the "Letter of Warning" dated 17 April 1973, deferring giving plaintiff his annual performance rating for the period ending 31 May 1973, and subsequently demoting plaintiff, effective 21 September 1973, without giving him his annual performance rating. In the third step, plaintiff's evidence abundantly shows what defendants claim were otherwise valid reasons for their actions were really a pretext to discriminate against the plaintiff for his previously filed discrimination complaint.

In Chaney v. City of Galveston, 368 F2d 774, at 776, in discussing the standard of Rule 52(a) to be applied in reviewing the trial court's determination, it stated:

"a finding is clearly erroneous when, although there is evidence to support it, the reviewing court on the entire evidence is left with a definite and firm conviction that a mistake has been committed.... it is well settled that in order for a reviewing court to satisfy findings of fact by a trial court sitting without a jury, it must be clearly demonstrated that such findings are without adequate evidentiary support in the record, or were induced by an erroneous view of the law, and the burden of showing that the findgins are clearly erroneous is on the one attacking them."

The deficiencies and inadequancies of the effort to eliminate employment discrimination within the Federal Government have been set forth in detail in the report of the United States Commission on Civil Rights of July 1975 entitled "The Federal Civil Rights Enforcement Effort-1974". It is the position of the plaintiff that the Federal Government should be bound by the same standards on equally employment opportunity and affirmative action as govern the practices of all other employers.

CONCLUSION

This petition presents important questions that will determine whether the promise of equal employment opportunity for all Government employees will become a reality under Title VII within some reasonable time or whether another two hundred years will be required.

For the foregoing reasons, this petition for a writ of certiorari should be granted.

BLEED THROUGH

Respectfully Submitted,

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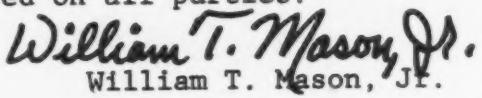
CERTIFICATE OF SERVICE

I hereby certify that three (3) copies of the Petition for a Writ of Certiorari in the case of Elmer Harris v. L. J. Ulanich, and others, were deposited postage paid in the United States mail, or hand delivered, to the Solicitor General of the United States, Department of Justice, Washington, D. C. 20530, and Edward R. Baird, Jr., Assistant U. S. Attorney, P. O. Box 60, Norfolk, Va., 23501, Counsel of record for respondents on April 1, 1976. It is further stated that the Petition has been served on all parties.



William T. Mason, Jr.

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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Norfolk Division

Elmer Harris, Plaintiff, v. L. J. Ulanich, et al, Defendants.	)	Civil Action No.73-369-N
Elmer Harris, Plaintiff, v. John Warner, Secretary of the Navy, et al, Defendants.	)	Civil Action No. 73-486-N

OPINION

These actions are brought pursuant to Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e et seq., as amended by the Equal Employment Opportunity Act of 1972.

Specifically, jurisdiction is asserted under 42 U.S.C. § 2000e-16(c) which provides that a federal employee may file a civil action if aggrieved by his agency's or the Civil Service Commission's final disposition of his complaint of discrimination based on race, color, religion, sex, or national origin. Jurisdiction is also asserted under 28 U.S.C. §§ 1343 and 1346(a)(2); the Declaratory Judgment Act, 28 U.S.C. §§ 2201-02 and Rule 57 of the Federal Rules of Civil Procedure; 5 U.S.C. § 703; and 42 U.S.C. §§ 1981 and 1985.

I

Plaintiff, Elmer Harris, is a black, civilian employee of the United States Navy at the Naval Supply Center (NSC), Norfolk, Virginia, and has been there

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employed for more than 27 years. In November, 1970 plaintiff was promoted to the position of Warehouseman General Foreman, WS-6907-10, and assigned to the Material Department of the Center. Plaintiff felt that his immediate supervisor, defendant L. J. Ulanich, Storage Officer of the Material Department, was denying him the opportunity to perform fully the duties of general foreman while not so restricting the white general foreman.

Harris sought a conference with Ulanich on October 16, 1972 to correct the allegedly disparate treatment. Ulanich stated to him there was no disparity. Plaintiff thereafter conferred with defendant Captain Laurence Spears, Director of the Material Department, with respect to his discrimination complaint. Thereafter, plaintiff met with Equal Employment Opportunity Counselor Joseph N. Sharp and requested a hearing before the EEO Committee of the NSC. Plaintiff's complaint was not resolved to his satisfaction and Harris was informed of his right to file a formal EEO complaint.[1]

Plaintiff filed a formal discrimination complaint on January 3, 1973 and the matter was referred to the Office

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1. There is conflicting testimony concerning the findings of the EEO Committee. Counselor Sharp states that the December 7 meeting resulted in a finding of discrimination and that after the meeting of December 15 the Committee determined the problem still had serious racial overtones. EEO Committee Chairman W. K. McKenzie, however, reported in a memorandum dated December 20, 1972 that "this is clearly a management problem. Whether or not discrimination is the motivation cannot be clearly determined by the Committee. Mr. Harris was advised of this and informed of his right to file a formal complaint." The statements of Chairman McKenzie are supported by the testimony of Shirley Ruffin Carr, who attended both committee meetings. It does not appear that the committee made any specific finding of discrimination.

of Civilian Manpower Management for investigation. The report of EEO Investigator George E. Ford, Jr., dated March 12, 1973, concluded that "[n]othing in the evidence and testimony of record indicates that Mr. Harris is restricted from performing the full scope of his duties and responsibilities as General Foreman because of his race."

Harris was notified on March 23, 1973 by Admiral E. W. Sutherling, Commanding Officer of the NSC, that the proposed disposition of his complaint was a finding of no racial discrimination. Dissatisfied with the proposed disposition, plaintiff requested a hearing and final decision by the Secretary of the Navy. Hearing was held on May 23 and 24, 1973 before John J. McFadden, EEO Complaints Examiner for the Civil Service Commission, who recommended a decision of no discrimination in a ten-page report dated July 17, 1973.[2]

The Department of the Navy Employee Appeals Review Board, after scrutinizing the hearing transcript and complaint examiner's report, adopted Mr. McFadden's findings. Plaintiff was notified by letter dated August 21, 1973 of the decision of the Secretary of the Navy that the "allegations of discrimination based on race are not substantiated by the evidence of record." Plaintiff challenges this determination in Civil Action No. 73-369-N.

Civil Action No. 73-486-N states two causes of action, each predicated upon plaintiff's allegations of reprisal discrimination as a result of his having filed the January 3, 1973 discrimination complaint against Ulanich.

While the January 3, 1973 discrimination charge

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2. At the May 23 and 24 hearing, fourteen witnesses testified and the transcript of testimony and exhibits exceeds 500 pages.

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was proceeding through the aforementioned administrative channels, defendant Ulanich issued Harris a "Letter of Warning" dated April 17, 1973 for allegedly unsatisfactory performance of his duties as general foreman. A follow-up letter by Ulanich dated June 7, 1973 alleged continued inadequate performance and reminded plaintiff that administrative action would be taken against him unless reasonable improvement was made.

Harris met with EEO Counselor Sharp on May 18 and again on June 7, 1973 with respect to the claim of reprisal and was informed at the latter meeting of his right to file a formal complaint. Such complaint was filed on June 20, 1973 (as amended June 22, 1974) alleging that the letters constituted reprisals because Harris had previously filed a discrimination complaint against Ulanich. On July 10, 1973 the matter was referred to EEO Investigator L. B. Shaw, who concluded in a report dated September 17, 1973 that the "Letter of Warning" was not issued as a reprisal action against Mr. Harris.

Adopting Shaw's findings, Admiral V. A. Lascara, Commanding Officer of the NSC, notified Harris on October 4 of the proposed disposition of his complaint. By letter of October 15, 1973 Harris' attorney expressed dissatisfaction with the proposed disposition and requested a decision by the Secretary of the Navy without a hearing. By letter dated November 13, 1973 the Department of the Navy Employee Appeals Review Board followed the Commanding Officer's proposed finding of no discrimination, stating: "[T]here was insufficient evidence to substantiate your complaint of discrimination because of your race or that you were the recipient of harassing and retaliatory treatment because of

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your previously filing of a formal EEO complaint." Rather than appeal this decision to the Civil Service Commission, plaintiff filed Civil Action No. 73-486-N on December 19, 1973.

On June 13, 1973 defendant Ulanich forwarded a memorandum to Captain Laurence Spears, Director of the Material Department, recommending plaintiff's demotion for an alleged failure to perform satisfactorily his duties as general foreman. Captain Spears assigned the matter on June 29, 1973 to Mrs. Alma D. Bradshaw for a pre-action investigation. In a twelve-page report dated July 30, 1973, Mrs. Bradshaw concurred with the Ulanich recommendation that Harris be demoted. On August 20, 1973 Captain Spears issued Harris advance notice of his change in grade from general foreman to the position of warehouseman foreman because he allegedly failed to perform the duties of general foreman in a satisfactory manner. Demotion became effective on September 21, 1973.

After consultation with EEO Counselor Sharp concerning the demotion, plaintiff filed a third formal EEO complaint on October 15, 1973, stating that the demotion evidenced continuing retaliation for his having filed the original discrimination complaint on January 3, 1973. The third complaint was assigned to EEO Investigator Moses T. Boykins on November 8, 1973. Boykins completed the investigation in December and a report with findings and a recommended decision that the demotion was not racially motivated was prepared on January 8, 1974 by another investigator, Berton E. Owens.

After an informal meeting between plaintiff and Admiral Lascara, Commanding Officer of the NSC, the admiral

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requested a supplementary investigation which was conducted by Owens on January 25 and 28. His January 29 report provided additional information concerning the motive for and reasons supporting the demotion. After a second informal adjustment meeting between Harris and Lascara in February, plaintiff was advised on March 6, 1974 that the proposed disposition of his third complaint was a finding that his change to a lower grade was not a reprisal for having filed a discrimination complaint.

Through his attorney, Harris expressed dissatisfaction with the proposed disposition, waived both his right to a hearing and to a decision by the Employee Appeals Review Board without a hearing, and asked instead that the proposed disposition be adopted as the final Navy decision. On March 19, 1974 Admiral Lascara notified Harris that it was the final decision of the Department of the Navy that "there was no reprisal nor discrimination involved" in the demotion. In lieu of an appeal to the Civil Service Commission, plaintiff, on April 3, 1974, amended his complaint in Civil Action No. 73-486-N to challenge judicially his demotion.

Plaintiff thus complains of three separate instances of racially motivated employment discrimination: (1) that he was denied the opportunity to perform fully the duties of general foreman; (2) that because he filed a discrimination complaint to rectify the situation set out in (1), he was issued a "Letter of Warning" in reprisal; and (3) that the reprisal ultimately culminated in his demotion.

II

Scope of Review

It is clear that the Equal Employment Opportunity

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Act of 1972 permits federal employees with employment discrimination complaints to file a civil action in the district courts. 42 U.S.C. § 2000e-16(c). As the United States Court of Appeals for the Fourth Circuit has recently observed: "[Section 2000e-16(c)] evinces a congressional policy to make the courts the final tribunal for the resolution of controversies over charges of discrimination after all administrative remedies have been exhausted." Koger v. Ball, 497 F.2d 702, 706 (4 Cir. 1974). The Fourth Circuit, however, has not addressed the question of the scope of judicial review required when a civil action is brought under § 2000e-16(c).

Plaintiff requested that his discrimination complaints be heard de novo in this Court. Such request was granted and defendants moved the Court to reconsider, arguing that a review in this case is properly limited to an examination of the administrative record. Ruling was withheld on defendants' motion and the matter proceeded to a de novo hearing on August 19, 20 and 22. Plaintiff was permitted to present anew any facts he desired.

After the granting of a full hearing in this case, the Court has been called upon to again determine the issue of whether a plaintiff in an action such as is here presented is entitled to a trial de novo.

Although § 2000e-16(c) clearly permits federal employees to "file a civil action" if aggrieved by the

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administrative disposition of a discrimination complaint, the statute is silent concerning the scope of judicial review to be afforded. The language in the legislative history is not very helpful, and does not determine the issue.[3]

It does not appear that the question has been decided by any court of appeals. However, the issue has been before a number of district courts. A majority of the district courts, after review of the entire legislation and legislative history, have concluded § 2000e-16(c) does not mandate a de novo hearing.[4]

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3. Compare 118 Cong. Rec. S2280-81 (daily ed. Feb. 22, 1972) (remarks of Senator Williams) and Cong. Rec. S2287 (daily ed. Feb. 22, 1972) (remarks of Senator Cranston) with 119 Cong. Rec. S1219 (daily ed. Jan. 23, 1973) (remarks of Senator Cranston) and Sen. Rep. No. 92-415, 92d Cong., 1st Sess. 16 (1971). For an excellent discussion of the legislative history see Hackley v. Johnson, 360 F.Supp. 1247, 1250-52 (D.D.C. 1973). See also Baca v. Butz, 376 F.Supp. 1005, 1008-9 (D.N.M. 1974).

4. Pendleton v. Schlesinger, Civil Action No. 1689-73 (D.D.C. August 9, 1974); Baca v. Butz, 376 F.Supp. 1005 (D.N.M. 1974); Spencer v. Schlesinger, 374 F.Supp. 840 (D.D.C. 1974); Thompson v. United States Dep't of Justice, Bur. of Narcotics & Dangerous Drugs, 372 F.Supp. 762 (N.D. Cal. 1974), rev'g 360 F.Supp. 255 (N.D.Cal. 1973); Tomlin v. United States Air Force Medical Center, 369 F.Supp. 353 (S.D. Ohio 1974); Handy v. Gayler, 364 F.Supp. 676 (D.Md. 1973); Johnson v. United States Postal Service, 364 F.Supp. 37 (N.D.Fla. 1973); Hackley v. Johnson, 360 F.Supp. 1247 (D.D.C. 1973); Chandler v. Johnson, 7 [CCH] EPO ¶9139 (C.D.Cal. 1973); Gautier v. Weinberger, 6 [CCH]EPO ¶9001 (D.D.C. 1973); Williams v. Mumford, 6 [CCH] EPO ¶8705 (D.D.C. 1973).

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At least four courts have construed the section to require de novo review.[5] The contrary view is persuasive and the reasoning in support of the contrary interpretation seems sound. See, e.g., Baca v. Butz, 376 F.Supp. 1005, 1008-9 (D.N.M. 1974); Hackley v. Johnson, 360 F. Supp. 676 (D. Md. 1973).

Here, all of plaintiff's claims were not processed in the exact same manner, but the short cuts were requested by plaintiff. Civil Service Regulations, 5 C.F.R. §§ 713.213, et seq. (1974), provide the aggrieved federal employee a variety of ways in which to prosecute a discrimination complaint. Once an initial investigation has been conducted, a complainant has three options: 1) to request a hearing and final agency decision, 2) to request final agency decision without a hearing, and 3) to do nothing, in which case the proposed disposition is adopted as the final agency decision. Whichever of the above procedures is utilized, a complainant may appeal the final agency decision either to the Civil Service Commission or to a federal district court.

Plaintiff filed his first complaint with this court after an administrative hearing and final decision by the Department of the Navy. The second complaint reaches us

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5. Richerson v. Fargo, 61 F.R.D. 641 (E.D.Pa. 1974); Henderson v. Defense Contract Admin. Services Region, 370 F.Supp. 180, 183-4 (S.D.N.Y. 1973); Jackson v. United States Civil Service Comm'n, 7 [CCH] EPO ¶ 9134 (S.D. Tex. 1973); Griffin v. United States Postal Services, 7 [CCH] EPO ¶ 9133 (N.D.Fla. 1973).

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after a final agency decision without a hearing. The third complaint was filed after plaintiff requested that the disposition proposed by the Commanding Officer of NSC be immediately adopted as the final Navy decision.

The mere fact that there was no administrative hearing on two of Harris' complaints does not compel a hearing de novo. Harris, after being fully informed of his right to appeal and the procedure for obtaining a hearing, chose to waive same. As stated by Judge Wollenberg -

> Under these circumstances plaintiff must be considered to have waived an administrative hearing knowingly and voluntarily.
>
> This Court would be improperly tampering with the administrative process if it were to fashion a rule entitling an aggrieved person to a hearing de novo in district court whenever he knowingly and voluntarily waived an administrative hearing. Thompson v. United States Department of Justice, Bureau of Narcotics and Dangerous Drugs, 372 F.Supp. 762, 764 (N.D.Cal. 1974), rev'g 360 F.Supp. 255 (N.D.Cal. 1973).

We are persuaded from a reading of the statute and the opinion of the Supreme Court in Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974), the de novo hearing is required. But inasmuch as there is such difference of opinion on the issue, and there are distinctions between the standards of de novo review and review of administrative action, to facilitate final resolution of this case we are making findings and stating conclusions separately under each type of review.

III

Review of the Administrative Record

The Court of Appeals for the Fourth Circuit has stated that administrative decisions may be reversed upon appeal only if found to be "arbitrary, unreasonable,

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capricious, or not supported by substantial evidence."[6] Halsey v. Nitze, 390 F.2d 142, 144 (4 Cir.), cert. denied 392 U.S. 939 (1968).

Although Halsey was decided prior to the enactment of the Equal Employment Opportunity Act of 1972, the court was there faced with plaintiff's claim that he was discharged from his position as a laborer at the Norfolk Naval Shipyard by reason of racial discrimination. In affirming the discharge the court stated: "The scope of judicial review, by us and by the district court, was fully exhausted when the record disclosed substantiality in the support for the administrative findings . . . ." Id. at 144.

Whether the 1972 Act requires closer scrutiny of a Civil Service Commission or agency decision has not been decided in this circuit. The United States District Court for the District of Columbia has stated that under § 2000e-16(c) the court must determine whether or not discrimination is "affirmatively established by the clear weight of the evidence in the record." Hackley v. Johnson, supra, at 1252. The United States District Court for the District of Maryland, however, has concluded that the Halsey substantial evidence test is appropriate when reviewing

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6. Supported by substantial evidence means "more than a scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Richardson v. Perales, 402 U.S. 389, 401 (1971). It is something less than the weight of the evidence. Consolo v. Federal Maritime Co., 383 U.S. 607, 620 (1966). In Laws v. Celebrezze, 368 F.2d 640, 642 (4 Cir. 1966), the court defined substantial evidence as that "which a reasoning mind would accept as sufficient to support a particular conclusion. It consists of more than a mere scintilla of evidence but may be somewhat less than a preponderance. If there is evidence to justify a refusal to direct a verdict were the case before a jury, then there is 'substantial evidence'."

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federal employee complaints of racial discrimination. Handy v. Gayler, 364 F.Supp. 676, 679 (D.Md. 1973).

While we are inclined to favor a standard which tends to establish the absence of discrimination with greater certainty than is the case when applying a "substantial evidence" yardstick, the result in the present action is the same whether the Halsey or the stricter Hackley standard is used. Not only is there substantial evidence in the record, but the clear weight of the evidence or a preponderance thereof supports the administrative findings that Harris was not discriminated against because of his race, nor was he subject to reprisals for having filed a discrimination complaint.

A

Turning first to plaintiff's complaint that his immediate supervisor, L. J. Ulanich, denied him the opportunity to perform fully the duties of general foreman because of his race, the record discloses that this contention was rejected by the EEO Committee of the NSC (see note 1 supra) and in turn by an EEO investigator, the Commanding Officer of the NSC, a Civil Service Commission complaints examiner, and the Department of the Navy Employee Appeals Review Board acting for the Secretary of the Navy.

Although plaintiff alleged various acts and practices to substantiate his charge of racial discrimination, primary reliance was placed upon six basic contentions: (1) Ulanich would assign temporary personnel to plaintiff's area of supervision without first informing him or, at other times, after plaintiff had specifically stated that additional manpower was not required; (2) Ulanich gave direct instructions to persons under plaintiff's supervision, thus bypassing plaintiff in the chain of command; (3) Ulanich assigned new employees directly to plaintiff's subordinate

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supervisors; (4) Ulanich assigned new black employees to plaintiff while placing new white workers under the supervision of the white general foreman; (5) plaintiff's implementation of a change in the handling of ZEL cards was summarily rejected, thus frustrating his attempt to demonstrate planning and organizational abilities; (6) Ulanich ordered plaintiff's office moved from the third to the fifth floor to isolate him and make the performance of his duties more difficult.

The thrust of plaintiff's first three allegations is that because he is black defendant Ulanich involved himself directly in the routine operation of the areas for which plaintiff was responsible, thus usurping authority specifically delegated to plaintiff.[7] EEO Complaints

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7. Harris' Position Job Description, 201.2-J2, provides, in pertinent part, that the general foreman:

> Is responsible for planning, coordinating, and directing through subordinate supervisors, a variety of related work operations pertinent to the receipt, storage, identification, and issue of approximately 312,000 line items of binnable material which includes both Navy and DSA owned stocks. Directs the accomplishment of work operations within the limits of policies and production schedules set by the Branch Head and oral and written instructions provided by superiors. Completed work is reviewed by the Branch Head, Storage Officer, GS-2030-12, for overall effective and economical use of personnel, equipment, materials, and methods to meet goals and quality standards.
>
> Analyzes work schedules; determines manpower, material requirements and methods to be used; and plans work assignments considering the availability of manpower and equipment, deadlines, and other work projects in progress. Provides information and advice to higher level supervision and staff personnel on such matters as ability to meet assignments as scheduled, budget requirements, changes in methods and procedures, and changes in facilities and equipment.
>
> Establishes a good working climate to encourage employees to participate in achieving management goals, and to promote efficient and economical work operations. Assigns and explains work requirements to subordinate supervisors, sets deadlines and sequence of operations, directs rearrangement

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Examiner John J. McFadden found that defendant Ulanich "furnished more direction and guidance to the complainant in the day-to-day performance of his duties than he has to the white General Foreman; [and] that he has on more frequent occasions assumed responsibility vested in the position of General Foreman in the case of the complainant." McFadden, however, rejected the claim of racial discrimination, stating: "[W]e ... do not find that such intervention by Mr. Ulanich arose from discrimination against the complainant because of his race or color."[8]

The Equal Employment Opportunity Act of 1972 does not condemn differential treatment as such; what is proscribed is "discrimination based on race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-16(a). Defendant Ulanich's managerial ability and the wisdom, indeed the propriety, of his actions are thus irrelevant here except insofar as they relate to the issue of racial discrimination. After careful scrutiny of the testimony, affidavits, and

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(7. continued)

> of space and equipment as necessary. Reviews and analyzes production, cost, personnel utilization records to evaluate progress of work and to control or reduce costs; studies problems and takes or recommends corrective action. Prepares operating instructions and schedules; develops quality and quantity standards; spot checks work as necessary and coordinates operations with other organizations or functions as necessary.

8. Rejecting plaintiff's claim, the complaints examiner also found that "the record clearly indicates that what Mr. Harris considered interference on the part of Mr. Ulanich, arises from a marked lack of confidence on Mr. Ulanich's part in the complainant's ability to perform the duties and responsibilities of his job effectively and efficiently."

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exhibits, we conclude that there is a clear and preponderate support for the administrative determination that Ulanich's intervention was not racially motivated.

Notwithstanding an absence of discriminatory intent, however, we are aware that activities may nevertheless violate the Act if found to have racially discriminatory effects.[9] The administrative record here under consideration, however, establishes that Ulanich demanded as much of one race as the other, and that he was not racially selective in denying subordinates the full exercise of delegated duties. Absent a showing of discriminatory intent or adverse effects upon plaintiff because of his race, Ulanich's actions were not unlawful and thus were properly rejected at the administrative level.

Plaintiff's remaining three allegations in support of his first discrimination complaint require little discussion. The claim that Ulanich assigned new personnel along racial lines is not supported by the record which indicates that the percentage racial composition of Harris' and Foutz' areas of supervision is nearly identical. Plaintiff's change in the handling of ZEL cards, rather than facilitating the movement of material, produced additional delays.

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9. The Supreme Court has rejected lack of intent to discriminate as a defense in Title VII actions involving private employment. Griggs v. Duke Power Co., 401 U.S. 424, 429-32 (1971). Accord, Pettway v. American Cast Iron Pipe Co., 494 F.2d 211, 251 n. 114 (5 Cir. 1974); Williams v. General Foods Corp., 492 F.2d 399, 404 (7 Cir. 1974); Robinson v. Lorillard Corp., 444 F.2d 791, 796-7 (4 Cir. 1971) cert. dismissed 404 U.S. 1006 (1972); Local 189, United Papermakers & Paperworkers, AFL-CIO, CLC v. United States, 416 F.2d 980, 996 (5 Cir. 1969), cert. denied 397 U.S. 919 (1970).

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Finally, the evidence does not support Harris' contention that the relocation of his office was a discriminatory act. The office of the white general foreman was also moved and, once relocated, both men received similar treatment. Other than plaintiff's statement that being located on the fifth floor made his job more difficult, all evidence indicates that the relocation was a valid management decision "to place him in his area of responsibility and away from the disturbances of the larger office."

B

Plaintiff's second formal EEO complaint, filed June 20, 1973 (as amended June 22, 1973), charged Ulanich with reprisal discrimination. Specifically, Harris contended that Ulanich issued him a "Letter of Warning" because he had previously charged Ulanich with racial discrimination. The complaint was referred on July 6 to the Office of Civilian Manpower Management, Norfolk, Virginia for investigation. That office designated Mr. L. B. Shaw as EEO investigator who reported on September 13 that the letter of warning was not issued in reprisal.

Harris met informally with Admiral Lascara on September 28 to discuss Shaw's findings and to attempt an adjustment of the complaint satisfactory to Harris. Admiral Lascara's letter of October 4, 1973 informed Harris that the proposed disposition of his complaint was a finding of no reprisal discrimination. Plaintiff's attorney notified the Commanding Officer that the proposed decision was unsatisfactory to Harris and a request was made for a decision by the Secretary of the Navy, without a hearing.

The Department of the Navy Employee Appeals Review Board examined the investigative report and all official documents. Finding insufficient evidence to substantiate

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Harris' charge of reprisal discrimination, the Board affirmed Admiral Lascara's proposed dismissal of the complaint.

Limiting our review to the administrative record, we focus upon the findings of EEO Investigator Shaw. His investigation was properly limited to the single issue raised in Harris' complaint -- whether Ulanich issued the letter of warning in reprisal because Harris had previously charged him with discrimination. Shaw summarized his findings, stating:

> Mr. Ulanich is, in essence, a demanding supervisor who wants his subordinate supervisors to keep him informed of problems, etc. Mr. Harris is an individual who wants to discharge his duties/responsibilities, etc. without intervention. Obviously, therefore, the two are not compatible in their theory as to how Mr. Harris should function. The incidents cited in the letter of warning are found to have substance.
>
> Nothing in the investigation report indicates that the 17 April 1973 letter of warning was issued as reprisal action against Mr. Harris because he had previously filed a formal complaint.

We need not here discuss in detail each incident set out in the letter of warning. Suffice it to say that the sworn affidavits of Mr. Poutz, Mr. Carter, and Commander Sofley clearly support the conclusion that issuance of the letter of warning was not an act of reprisal.[10] The primary purpose of the letter of warning was to advise Mr. Harris that unless his performance improved, he would receive "a

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10. We note, as did Mr. Shaw, that there is contradictory evidence concerning the CBW Shift Report prepared by Mr. Madrid. Even if we assume the recital of that incident in the letter of warning to be incorrect, however, there is ample evidence to support other incidents set out in the letter and, thus, the conclusion that its issuance was not an act of reprisal.

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rating of 'unsatisfactory' in the factor of adaptability" which would result in an annual performance rating of unsatisfactory.

The term "adaptability" as it is used in connection with an employee's annual performance rating refers to such things as "cooperation with supervisors and fellow workers; attitude; reliability; observance of rules; and general adjustment to conditions of work." NSCNORVA INSTRUCTION 12430.2J dated March 19, 1973. Concerning Harris' cooperation with superiors, a statement made by Commander Sofley, Director of the Storage Division, is especially relevant:

> My observations of Mr. Harris is that he is frequently rude in his work contacts, he is abrupt and often will not accept criticism from higher supervision. He does not try to be a member of the team.

We have carefully reviewed the Shaw report, indeed the entire record concerning Harris' second complaint. The weight of the evidence supports the conclusion that the letter of April 17, 1973, was not issued by Mr. Ulanich as reprisal because plaintiff had previously charged him with racial discrimination.

C

Harris' third formal EEO complaint challenged his demotion as continuing reprisal because he had earlier charged Ulanich with racial discrimination. As has been previously stated, the matter was formally investigated after which the Commanding Officer of NSC informed Harris that the proposed disposition of the complaint was a finding that the demotion was not an act of reprisal.

Expressing dissatisfaction with the proposed decision, plaintiff's attorney stated: "We do not desire a

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hearing nor do we desire a decision by the Secretary of the Navy (Employee Appeals Review Board) without a hearing." Instead, plaintiff requested that the proposed disposition be adopted as the final Navy decision so that he could choose between an appeal to the Civil Service Commission or the district court. Plaintiff chose the latter option and we now proceed to a review of the administrative file.

We note that plaintiff's complaint raised the single issue of whether his demotion was an act of reprisal. EEO Investigator Moses T. Boykins conducted the initial investigation, the report of which was prepared by senior EEO Investigator Berton E. Owens. The Commanding Officer of NSC ordered a supplementary investigation which was conducted by Mr. Owens. During the course of the investigation, Captain Laurence Spears, Director of the Material Department, by sworn affidavit, stated that prior to advising Harris that he would be demoted, he ordered an investigation:

> I called for a pre-action investigation by an investigator outside of the Material Department. The procedure was prompted by Mr. Harris' past record of complaints and alleged problems with Mr. Ulanich and other management personnel to insure that the investigator would provide an objective review.
>
> . . . . The review affirmed the reasons for the demotion and the investigator specifically endorsed Mr. Ulanich's recommendation. At no time was there any indication that Mr. Ulanich was motivated by consideration of race or color. I took particular care to investigate this because of Mr. Harris' prior complaints. Over 50% of employees in my Material Department are black. I will not tolerate and cannot tolerate any managerial actions which have even the appearance of discrimination on the basis of race or color.[11]

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11. The pre-action investigation referred to by Captain Spears was conducted by Mrs. Alma Bradshaw. The investigation appears to be a conscientious effort to establish the facts.

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The affidavit of Lt. Cdr. Goodman likewise indicates his attempt to insure that Harris was demoted because of performance deficiencies and not because of his race. After careful study of the entire record, we find the testimony of Lt. Cdr. Goodman and Captain Spears and the pre-action investigation persuasive evidence that Harris' demotion was not an act of reprisal.[12]

In summary, we conclude that the administrative findings on each of plaintiff's complaints were neither arbitrary, capricious nor unreasonable. Moreover, our review of the records indicates that the greater weight of the evidence supports the conclusions that plaintiff was not discriminated against because of his race nor was he subject to reprisal discrimination. Accordingly, each administrative decision must be affirmed.

IV

De Novo Review

As has been stated, this matter proceeded to trial on August 19, 20 and 22. Sixteen witnesses testified and the exhibits are numerous. The issues before us were identical to those raised at the administrative level, that is, whether, because of his race, plaintiff was denied the opportunity to perform the duties of general foreman and whether issuance of the April 17, 1973, letter of warning and the demotion constituted reprisal discrimination. While the entire administrative record was admitted into evidence, we are not in a de novo hearing in any way bound by those findings, and in determining the issues from the evidence presented before this court, we have afforded them no greater weight than any

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12. Even if we were to assume that the Ulanich recommendation that Harris be demoted was a retaliatory act, there is no evidence that the individual who made the ultimate decision, Captain Spears, accepted that recommendation without question. To the contrary, the evidence is clear that Captain Spears took particular care to ensure that the demotion of Harris was related solely to performance deficiencies.

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other evidence presented.

We note at the outset that in civil actions involving racial discrimination, plaintiff bears the ultimate burden of establishing the fact of discrimination by a preponderance of the evidence. See, e.g., Christian v. General Motors Corp., 341 F.Supp. 1207 (E.D.Mo. 1972), aff'd, 475 F.2d 1407 (8 Cir. 1973); Ochoa v. Monsanto Corp., 335 F.Supp. 53 (S.D.Texas 1971); aff'd 473 F.2d 318 (5 Cir. 1973).

Discussing the allocation of the burden of proof in private, nonclass actions under Title VII, the Supreme Court recently stated in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 800-04 (1973), that the complainant has the initial burden of establishing a prima facie case, after which the burden shifts to the defendant to articulate some legitimate, nondiscriminatory reason for its action. If a defendant successfully rebuts the prima facie case, plaintiff must nevertheless be given the opportunity to show that defendant's explanation is merely pretextual.

McDonnell involved a qualified individual who was denied employment and the Court set out four factors which establish a prima facie case of discrimination in that situation. In the present action, the facts are far different from those in McDonnell and thus the precise factors there applied are not applicable. Harris has shown that he is a member of a minority race, and that he was treated somewhat differently from the white general foreman. What Harris has failed to show is that the difference in treatment is related to the fact that he is black. Even if we assume that Harris' first complaint states a prima facie case, defendants have explained their actions and the explanation has not been shown to be a mere pretext.

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Background

A little background of the establishment and operation of the NSC at Norfolk may be of help in determining the issues before the court.

The Center is the largest storehouse in the world. It is the principal supplier of items for the Navy. It has more than 800 different customers per day, and there is a fast turnover of most all of the items.

The overall responsibility of the Materials Department is the receiving and storage of materials, and the returning of them to operations. During the period of much of the controversy here complained of, Captain Laurence Spear was Director of the Materials Department, now the Freight Terminal Department. Commander Billie R. Sofley was Director of the Storage Division. L. J. Ulanich is in charge of the branch directly under Commander Sofley. Plaintiff Harris and William H. Fautz are the two general foremen under Ulanich, each in charge of a unit.

The storage system operated in the branch is an automated handling system, operated on a time frame system. It is computerized, with more than 500,000 items in stock. The items are classified according to urgency of issue into three groups, with a time limit within which to issue each group item.

Items are brought up to the storage areas on conveyor belts, from which they are removed and stored in bins.

About 80% of all materials issued from the NCS are issued from the branch of Ulanich. Materials are received five days a week, but issues of supplies are seven

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days a week, 24 hours a day, and all stations throughout the world are supplied from this base.

Time is critical in the receipt and issue of materials. As Captain Spear related, a backlog of day-old items is not critical, but if more than that, it is critical. Quite frequently materials received one day must go out the same day. Hence there is a need to get the receipts in the bins.

A

Plaintiff alleges in Civil Action No. 73-369-N that he was subject to racial discrimination in the performance of his duties as general foreman. Specifically, Harris contends that his immediate supervisor, L. J. Ulanich, did not permit him the full exercise of the responsibilities and authority described in his job description.[13]

To support his claim of racial discrimination, plaintiff complains that his office was relocated, that he was denied secretarial assistance, that he was not given the opportunity to perform his duties, that personnel was assigned to and from his unit without his approval, and that more blacks than whites were assigned to his unit.

In general, Ulanich is responsible for the storage and issuance of all supply items. He is charged with directing the personnel of the branch, to exercise and delegate authority and evaluate the performance of those under his command. He has authority to assign personnel on a permanent or temporary basis, to move employees based on work load, to send assistance to any point in need, and to shift personnel

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13. The job description is set out in note 7, supra.

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when necessary. It is his duty to send assistance when a backlog of work occurs, assign assistance when an unusual work problem occurs, and whenever there is a need of extra help to assign it, whether requested or not. He stated that his duty and his goal is to do the work better and more efficiently. To improve on the overall operations, Ulanich held meetings with those under his command, and requested their suggestions and assistance.

We proceed now to the specific issues.

The office space occupied by Harris and Foutz was located with that of Ulanich in one large office or space. Secretaries, clerks and others were within the same space. There was no room for holding a conference or meeting. Space was provided for Harris on the fifth floor, immediately adjacent to the office of the director of the storage division, and in the location of the area of responsibility, i.e., Harris' responsibility, consisting of the fourth, fifth and sixth floors. At the same time, the office of Fautz was moved and established on the third floor, the area of his responsibility, i.e., the first, second and third floors of the building. The office space of each of them was almost identical.

Ulanich requested that Harris and Foutz each be allotted a clerk-typist. The request was denied. Ulanich provided that any typing needed would be done by the typist in his office. A pickup service was provided to pick up papers from Harris' office once an hour.

It is established the relocation of the offices was done to improve the efficiency of the branch, to afford the parties privacy, and to afford proper working space closer to their areas of responsibility.

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Harris says that Ulanich's directions made it more difficult for him to have writings typed by instructing the typist in Ulanich's office not to type such writings without his permission. However, it is established that Ulanich gave identical directions for writings submitted by both Harris and Foutz. Ulanich directed that if the writing was a memo to him or was to remain in the branch, there was no need to type it, since the handwritten paper would serve the same purpose.

Ulanich readily stated he assigned personnel to work in Harris' unit, without a request from Harris, and that he did the same in Foutz' unit; that he assigned new personnel to Harris' unit and to Foutz' unit and at times carried them to or had them report directly to the supervisors for whom they would be working; and that he did at times assign personnel from A-13 Unit directly to Harris' and Foutz' work areas to perform some specific job, and did this at times when Harris had said he did not need help. But Fautz testified Ulanich did the same in his unit.

It is uncontradicted that at times when new employees, who were to be assigned to a particular unit or supervisor, reported for work, Ulanich was not able to contact Foreman Harris or Foreman Foutz, and he would then send or take the person directly to the place where they were to work and have them report to the supervisor. Thereafter, he would notify Foreman Harris or Foreman Foutz.

At times Ulanich directed personnel to Harris' unit to assist in some specific work or to perform some specific detail and assigned persons to Harris' unit even though not requested, or when Harris had reported he did not need assistance. But, the same was done in Foutz' unit.

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Ulanich said that whenever he observed the need of assistance, it was his duty to send it whether requested or not; that he had the responsibility to see that the work was timely done. Unit A-13 was created for the purpose of providing personnel available for assignment for special tasks, and when assistance was needed.

Further, Harris complained that Ulanich would not let him perform his work in the manner in which he desired to.

Ulanich had meetings with the supervisory personnel almost weekly. He had individual meetings with Harris about the work, and asked him for suggestions. Ulanich said, and it is not contradicted, that Harris never made a suggestion of how to improve the work or the efficiency of the branch; that he would not volunteer information; that he was arrogant; that he would leave the meetings before they were concluded; that he was consistently late coming to the meetings; that he constantly stated there were no problems in his unit, although the work was not current.

It was the duty of Ulanich to assign personnel where he determined help was needed since he had the overall responsibility to see the job done. But Harris pointed to no act of Ulanich which in any way prevented him from performing the work in his branch.

Captain Spear said he heard the first day he reported at his office that Harris was unhappy about his work; that Commander Swartz had recommended on several occasions that Harris be demoted; that when the problem arose he appointed Mrs. Bradshaw to make an investigation and to report. He said that constantly he tried to inform and educate the personnel to the requirements of getting along in the work and that there could be no discrimination on account of race.

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Commander Sofley testified he relieved Commander Swartz; that he had been told by Swartz that there was friction and that he should talk to Ulanich and Harris; that in conversation with Harris, Harris complained Ulanich would not let him do his job but he could offer no specifics; that after an investigation he disagreed with Harris. He said that in discussions with Harris, Harris was loud, antagonistic and talked about everything except the question at issue.

The evidence is replete that Harris' unit did not keep the work current. While Harris and some of his subordinates testified that 120 to 150 items on hand unstored was not an unusual thing, such a situation did not exist in Foutz' unit.

While Harris said that blacks were assigned to his unit and whites were assigned to Foutz' unit, the evidence established this was not true, and that assignments were made by Ulanich without regard to race. It was uncontradicted that Ulanich voted for the selection of Harris as foreman of his unit. Foutz was quite definite in his testimony that there was no unequal treatment of blacks and whites. It was established that the racial composition of Unit A-13, which is under command of Foutz, is 75 to 80% black and that the makeup of the personnel under the supervision of both Harris and Foutz was about 70% black. Hence the composition of each unit is about the same.

While Harris charges that the above actions evidence racial discrimination, such charges are not supported by the evidence. Nor is there any credible evidence to show Ulanich's action were racially motivated; the preponderance of the evidence is to the contrary.

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Recognizing that racial discrimination is often subtle, the fact that there is no evidence of an intent to discriminate does not end our inquiry. We have reviewed the evidence with utmost care to determine whether any of Ulanich's actions adversely affected plaintiff because he is black. After reviewing all the evidence, however, we conclude that there is no evidence of differences in Ulanich's treatment of Harris and Foutz attributable to the race of either foreman. While Harris often disagreed with the actions taken and orders given by Ulanich, it was Ulanich's overall responsibility to see that the work was done. It was Harris' duty to cooperate with Ulanich and, likewise, it was Ulanich's duty to assist Harris. The evidence established he sought to do so but Harris seemed to resent the offering of advice or assistance.

Whether Harris' interpretation of his job description is correct and whether Ulanich's actions infringe upon plaintiff's autonomy and authority as set out in his job description is not our primary concern. The issue before us is racial discrimination. It seems, however, that Harris basically asks this Court to find Ulanich guilty of usurping authority which he felt had been specifically delegated to him. It is this nonracial conflict between Ulanich and Harris concerning the scope of Harris' authority, the extent of his independence and the manner in which the duties of the general foreman were to be performed which accounts for some of the differences between the parties. While we need not decide whether Ulanich actually denied plaintiff the opportunity to perform fully the duties of a general foreman, we do decide that such denial, if any, is in no way attributable to plaintiff's race.

Finding no intent to discriminate and no discrimination, nor any racially discriminatory effects, plaintiff's

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complaint in Civil Action No. 73-369-N is dismissed and judgment will be entered in favor of all defendants.

B

Plaintiff's second complaint alleges that when on April 17, 1973 defendant Ulanich issued him a "Letter of Warning" for alleged performance deficiencies, the letter, in fact, was issued in reprisal because Harris had previously filed a discrimination complaint against Ulanich. Various instances of deficient performance are set out in the letter. While plaintiff denies that some of these incidents happened, his own testimony confirms the occurrence of the majority of incidents enumerated in the letter and they are fully supported by the evidence. What plaintiff does suggest is that Ulanich's recital of the facts is incorrect. Thus, plaintiff denies that any of the occurrences reflect adversely on his job performance. While the evidence is conflicting, the weight of the credible evidence establishes that the recital of facts in the letter of warning is correct. Accordingly, we conclude its issuance was not an act of reprisal. Other than the attempted refutation of the Ulanich letter, plaintiff has offered no evidence to indicate that its issuance was otherwise a retaliatory act. His complaint, therefore, is dismissed and judgment will be entered in favor of all defendants.

C

Harris' final complaint challenges his demotion as an act of reprisal discrimination. As with the reprisal complaint concerning the letter of warning, plaintiff has

set out his version of the incidents of alleged deficient performance which brought about his demotion.[14] Plaintiff suggests that the evidence clearly indicates that some of the incidents which supported his demotion never occurred and the recital of those which did occur is a distortion of the facts. Basically, plaintiff contends that because the reasons cited as justification for his demotion have no substance, the demotion must constitute reprisal discrimination. We need not decide whether such a conclusion necessarily follows since the great weight of the evidence indicates that plaintiff was demoted because of performance deficiencies and not because he is black nor because he had filed a discrimination complaint against his supervisor. There being insufficient evidence to support this claim of reprisal discrimination, we dismiss the complaint and judgment will be entered in favor of all defendants.[15]

Since some of the issues set out in the letter of August 20, 1973, have been dealt with above, and since the issue here is only whether the demotion was racially motivated, we will relate the evidence and findings only to a few of the incidents.

It is abundantly established that Harris was not keeping his receipts and issues current. While he said

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14. Letter dated August 20, 1973 (Demotion; advance notice of) sets out the various instances of unsatisfactory performance supporting Harris' demotion.

15. In his post-trial memorandum, plaintiff, for the first time, argues that he was never given an annual performance rating for the period ending May 31, 1973 and thus he was denied his right to appeal such rating if he so desired. See 5 U.S.C. § 4305. This contention is collateral to the issues of racial discrimination before this Court and, thus, not properly before us.

We note that plaintiff has argued numerous other points not specifically discussed in the body of this opinion. We have carefully considered these arguments and find them to be without merit.

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120 to 150 receipts on hand was not unusual, Mr. Foutz said such a quantity of receipts not placed in the bins constituted a backlog. Numerous times Harris' attention had been directed to this situation and assistance offered him. In fact, he had been urged to accept the use of additional personnel. When additional personnel was sent to the Harris unit, Harris ordered them back to the A-13 unit. After Harris had refused assistance, a check was made of his section and it was determined that in the area of Mr. Holmes there were 140 receipts unstored and in the area of Mr. Uzzell there were 110 receipts unstored. Near the end of the day 223 cards were turned in for input through the remote station. While such action was often the case with the Harris unit, the evidence establishes it did not exist with the Foutz unit. While Harris and some of those under his command said it was not unusual for them to have 120 to 150 stock cards on hand at the end of the day, which had not been processed, Foutz said this was unusual and did not happen in his unit. It was to prevent such situations that Ulanich offered and insisted that Harris accept assignment of help.

When Harris was confronted with his actions or conduct, he often became loud and boisterous. While he denied such actions and conduct, it was abundantly established by the testimony of Commander Sofley, Foutz, Mrs. Harris, Mrs. Carr and Smith.

Ulanich had established, with the consent of the command, a policy of requiring authorized persons in the supply area to wear a badge. When a visitor came to the area, he was issued a badge. However, in January, 1973 approximately ten representatives from electrical companies were being escorted by Mr. Carter, an authorized person, through the Supply Center so they could inspect the area for

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the purpose of submitting bids for work to be done in the area. Prior notice of their appearance had been given to Harris and all persons in the area. Instructions had been issued that these persons were not to be challenged or interferred with. In spite of such instructions, Harris challenged the persons and after being again advised that badges were not required, he persisted in interferring with them, all of which was in direct disobedience to the order.

When Harris was asked by Commander Sofley, his superior, why he did not answer his telephone, Harris replied, "No comment."

The letter of August 20, 1973 is full and explicit. While Harris denied each of the items set out therein, it is sufficient to say that the evidence abundantly establishes the correctness of each of them.

Clearly there is nothing in the record to show that any of the action taken was prompted by race discrimination. Full investigations were ordered and made, all of which established the actions taken were not racially related. In fact, except for the testimony of Harris, there is no evidence upon which the Court could say that the race of Harris in any way entered into his demotion, or the other actions taken.

Conclusion

Reviewing the administrative record and hearing the evidence de novo, and taking them singularly or combined, there is clearly insufficient evidence to support plaintiff's contentions of any discrimination because of his race. Except for the testimony of plaintiff, the evidence, reports, exhibits and events fail to even indicate any racial discrimination. Plaintiff was not denied the opportunity to fully

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perform the duties of general foreman because of race or otherwise, nor was he subject to reprisals for having filed any discrimination complaint.

While we are now of the opinion that the scope of judicial review in cases of this kind should not be limited to an examination of the administrative record, since we had granted a de novo hearing, we have made a determination limited to the administrative record, and one based on a de novo trial. The result is the same. However, until the United States Court of Appeals for the Fourth Circuit or the Supreme Court decides otherwise, in the future all cases of this type will not be limited to the review of the administrative record, and a de novo hearing will be granted.

Accordingly, the administrative findings are affirmed, the complaints are dismissed and judgment will be entered in favor of the defendants.

United States District Judge

Norfolk, Virginia
November 14, 1974.

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UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 75-1358

Elmer Harris,

Appellant,

versus

L. J. Ulanich, Storage Officer, Material Department, Naval Supply Center; Laurence Spears, Director, Material Department, Naval Supply Center; V. A. Lascara, Commanding Officer, Naval Supply Center; John Warner, Secretary of the Navy; The United States of America; John Warner, Secretary of the Navy, Department of the Navy, V. A. Lascara, Commanding Officer, Naval Supply Center,

Appellees.

Appeal from the United States District Court for the Eastern District of Virginia, at Norfolk. Richard B. Kellam, District Judge.

Argued November 13, 1975 Decided Dec. 3, 1975

Before HAYNSWORTH, Chief Judge, CRAVEN and FIELD, Circuit Judges

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William T. Mason, Jr., (Mason, Moore and Robinson on brief) for Appellant; Harry K. Tebbutt and (Edward R. Baird, Jr., Assistant United States Attorney on brief) for Appellees.

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PER CURIAM:

A black citizen brought a private action against his white supervisor, charging racially motivated employment discrimination. The district court found the supervisor was demanding, but concluded he was equally demanding and did not act from racial motivations.

The district judge's findings were not clearly erroneous, and we affirm on the basis of his opinion.

AFFIRMED.

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In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1390

ELMER HARRIS, PETITIONER

v.

L. J. ULANICH, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

Petitioner, a black civilian employee of the United States Navy, challenges the district court's finding, upheld by the court of appeals, that he was not subjected to racial discrimination by his federal employer.

Petitioner is employed at the Naval Supply Center, Norfolk, Virginia. He filed three administrative complaints with the Center in 1973, contending (1) that he had been denied the opportunity fully to perform his duties because of racially motivated employment discrimination; (2) that because he filed a discrimination complaint to rectify that situation, he had been issued a "Letter of Warning" in reprisal; and (3) that the reprisal had culminated in his demotion from General Foreman, WS-10, to Warehouseman Foreman, WS-6. Each of the complaints was denied by the Navy on the basis of administrative findings that petitioner had not been subjected to racial discrimination.

Petitioner thereupon filed this action under 42 U.S.C. (Supp. IV) 2000e-16, asserting each of the complaints that he had raised administratively. The district court, recognizing that the courts were in disagreement over whether a plaintiff in petitioner's situation was entitled to a *de novo* trial rather than a review of the administrative record,[1] held a full trial and filed an extensive opinion (Pet. App. 1-33). The court concluded that "[r]eviewing the administrative record and hearing the evidence *de novo*, and taking them singularly or combined, there is clearly insufficient evidence to support [petitioner's] contentions of any discrimination because of his race" (Pet. App. 32). The court of appeals affirmed on the basis of the district court's opinion, ruling that "[t]he district judge's findings were not clearly erroneous" (Pet. App. 34-35).

Petitioner argues only that the district court's findings were clearly erroneous. The court of appeals considered and correctly rejected that contention, and there is no reason for further review. See, *e.g.*, *Graver Tank & Mfg. Co.* v. *Linde Air Products Co.*, 336 U.S. 271, 275; *Berenyi* v. *Immigration Director*, 385 U.S. 630, 635.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

MAY 1976.

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[1]That issue is before this Court in *Chandler* v. *Roudebush*, No. 74-1599, argued March 2, 1976.